Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

TERM,

No. 75-34

COLIN F. BEATON AND ELEANOR M. BEATON,
APPELLANTS,

*v.*

JUDGES OF THE LAND COURT, ET AL.,
APPELLEES.

---

## ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

---

## JURISDICTIONAL STATEMENT

---

DANIEL H. KELLEHER
73 Tremont Street
Boston, Massachusetts
SAUL E. LIPNICK
18 Tremont Street
Boston, Massachusetts
*Counsel for Appellants*

Blanchard Press, Inc., Boston, Mass. — Law Printers

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Constitutional Provisions and Statutes Involved | 2 |
| Statement | 7 |
| The Question Is Substantial | 10 |
| St. 1943, Section 57, of the Laws of the Commonwealth of Massachusetts as amended by Statute 1959, c. 105, as construed by the court below to prohibit a mortgagor from appearing and defending in a judicial proceeding to foreclose a mortgage on his real estate violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. | |
| Conclusion | 17 |
| Appendix A | 18 |
| Appendix B | 19 |
| Appendix C | 29 |
| Appendix D | 31 |


### Table of Citations

*Cases*


| | |
|---|---|
| *Beaton et al* v. *Judges of the Land Court et al*, 1975 Mass. Adv. Sh. 1005 | 2, 11, 14, 15, 19 |
| *Bendslev* v. *Commissioner of Public Safety*, 328 Mass. 443 (1952) | 15 |
| *Bianchi* v. *Morales*, 262 U.S. 170 (1923) | 13 |
| *Boddie* v. *Connecticut*, 401 U.S. 379 (1971) | 16 |
| *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) | 14, 16 |

Page

*Gamer* v. *Tri-State Development Company,* 382 F. Supp. 377 (1974) ..... 16
*Lindsey* v. *Normet,* 405 U.S. 56 (1972) ..... 13
*Lynn Institution for Savings* v. *Taff,* 314 Mass. 380 (1943) ..... 11
*Martin* v. *Murphy,* 216 Mass. 466 (1914) ..... 15
*Northrip* v. *Federal National Mortgage Association,* 372 F. Supp. 594 (1974) ..... 16
*Piea Realty Co.* v. *Papuzynski,* 342 Mass. 240 (1961) . 11
*Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337 (1972) ..... 16
*State Realty Company of Boston* v. *MacNeil Bros.,* 334 Mass. 294 (1956) ..... 11
*Turner* v. *Blackburn,* 389 F. Supp. 1250 (1975) .... 15, 16
*Yakus* v. *U. S.,* 321 U.S. 414 (1944) ..... 15

*Statutes*

28 U.S.C. § 1257(2) ..... 2
50 U.S.C. § 532 ..... 11
Massachusetts General Laws, c. 185 ..... 7
Massachusetts General Laws, c. 244 ..... 15
Acts 1943, Section 57 ..... 2, 3, 8, 10, 11, 12, 14, 15
Acts 1959, C. 105 ..... 2, 6, 8, 9, 10, 11, 12, 13

*Constitutional Provisions*

Fourteenth Amendment ..... 2, 9, 10

# In the Supreme Court of the United States

TERM,

---

No.

---

COLIN F. BEATON AND ELEANOR M. BEATON,
APPELLANTS,

*v.*

JUDGES OF THE LAND COURT, ET AL.,
APPELLEES.

---

## ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

---

## JURISDICTIONAL STATEMENT

---

The Appellants Colin F. Beaton and Eleanor M. Beaton appeal from the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on April 10, 1975.

## Opinions Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is officially reported at 1975 Mass. Adv. Sh. 1005 and unofficially reported at 326 N.E. 2d 302. The opinion is reproduced in the Appendix at p. 19.

## Jurisdiction

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on April 10, 1975. (A. 18). A Notice of Appeal to this Court was filed in the Supreme Judicial Court for the Commonwealth of Massachusetts on June 5, 1975 (A. 29). The Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(2).

## Question Presented

Whether the construction of St. 1943 Section 57 of the Laws of the Commonwealth of Massachusetts as amended by St. 1959 c. 105 to prohibit a mortgagor, named as a defendant and served with notice to appear in a proceeding to foreclose a mortgage on his real estate, from appearing in the proceeding to contest the existence of a default on the mortgage, from filing an answer raising defenses to foreclosure and from being heard prior to foreclosure on issues raised in the answer, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

## Constitutional Provisions and Statutes Involved

### FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they



reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### ACTS, 1943, CHAPTER 57

St. 1943, c. 57, § 1 provides in pertinent part:

SECTION 1. In any proceeding in equity for authority to foreclose a mortgage, which for the purposes of this act shall be construed to include a trust deed, or other security in the nature of a mortgage, covering real or personal property, or both, by entry and possession, by exercise of a power of sale contained therein, or otherwise as provided by law, or to make any seizure of property thereunder, brought because of an Act of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, or any amendments thereto hereafter enacted, notice may be issued in substantially the following form by the court in which such proceeding is pending, returnable on any convenient date, irrespective of the return days otherwise prescribed by law or rule, and requiring all appearances and answers to be filed on or before the return day:—

COMMONWEALTH OF MASSACHUSETTS

..... COURT

....., ss. In Equity

*To* (insert the names of all defendants named in the bill) *and to all whom it may concern:*

..... claiming to be the holder of a mortgage —trust deed—security in the nature of a mortgage (strike out the descriptive words which are inapplicable) covering ..... property (insert nature of property, whether real or personal) situated in (insert location of property,

including name of city or town and, if stated in the mortgage or in the bill, the street and number) given by (insert names of parties, date and reference to record), has filed with said court a bill in equity for authority to foreclose said mortgage—trust deed—security in the nature of a mortgage—in the manner following: (insert contemplated method of foreclosure, whether by entry and possession, exercise of a power of sale, or otherwise)—to seize certain real—personal—property (strike out descriptive word which is inapplicable) covered by said mortgage—trust deed—security in the nature of a mortgage.

If you are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, and you object to such foreclosure or seizure, you or your attorney should file a written appearance and answer in said court at ..... on or before ..... (Return Day), or you may be forever barred from claiming that such foreclosure or seizure is invalid under said act.

Witness ..... Esquire, Judge of said Court, this ..... day of ..... 19 . .

The publication of a copy of said notice once not less than twenty-one days before the return day in a newspaper designated by the court, and the mailing of a copy thereof by registered mail not less than fourteen days before the return day to each defendant named in the bill, shall be sufficient service of said notice, unless the court otherwise orders, provided however that prior to the return day fixed in said notice a copy thereof shall be recorded in each registry of deeds and city or town clerk's office in which such mortgage is recorded.

SECTION 2. An entry and possession taken for the purpose of foreclosure, or a foreclosure effected by exercise of a power of sale or by any other method, or a seizure of property, done pursuant to authority granted in such proceedings, may be approved by the court but not until after



the expiration of the period for appeal from the order authorizing the same. There shall be no appeal from or review of such approval.

The period of thirty days within which a copy of the notice of sale and an affidavit are required to be recorded by section fifteen of chapter two hundred and forty-four of the General Laws, and the period of thirty days within which the memorandum or certificate of entry is required to be recorded by section two of said chapter two hundred and forty-four shall, in case such a proceeding has been had, be computed from the time the court approves the sale, or entry, rather than from the time of the sale, or entry, as provided in said sections.

A copy of the order authorizing foreclosure by entry, or by sale, or otherwise as provided by law, or a copy of the order authorizing the seizure of property, and the approval thereof, may be recorded in the registry of deeds and city or town clerk's office in which such mortgage is recorded, and if so recorded shall be conclusive evidence of compliance with the provisions of said Soldiers' and Sailors' Civil Relief Act of 1940, and any amendments thereto, in so far as the court has power to determine the same, as against all persons, except that such copy shall not be conclusive evidence of such compliance against persons whose interests appeared of record prior to the recording of the notice of said proceeding unless they were named as defendants or had notice of said proceeding.

SECTION 3. In proceedings, under section one hereof where a mortgage includes land, the land court shall have jurisdiction as to said mortgage even though it may include personal property and shall have jurisdiction as to any additional or supplementary mortgage securing the same obligation although such mortgages include personal property.

SECTION 4. Chapter twenty-five of the acts of nineteen hundred and forty-one is hereby repealed, but the repeal thereof shall not be construed to affect any proceedings which shall have been brought heretofore under said chapter twenty-five.

ACTS, 1959, CHAPTER 105

St. 1959, c. 105 provides in pertinent part:

SECTION 1. The form of notice in section 1 of chapter 57 of the acts of 1943 is hereby amended by striking out the salutation or greeting and inserting in place thereof the following:—

*To* (insert the names of all defendants named in the bill) *and to all persons entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended:*

SECTION 2. Said section 1 of said chapter 57 is hereby further amended by adding at the end the following paragraph:—

In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, with respect to the mortgage, trust deed or other security described in the bill whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of the act, is filed with the appearances. Such proceedings shall be limited to the issues of the existence of such persons and their rights, if any.



## Statement

Appellants, Colin F. Beaton and Eleanor M. Beaton, hereafter "the Beatons", are husband and wife and the owners in fee as tenants by the entirety of certain land in Bridgewater, Massachusetts (Petition for Writ of Mandamus, para. 4). On October 10, 1966 the Beatons mortgaged said land to Appellee, Quincy Oil Co., presently Quinoil Industries, Inc., hereafter "Quinoil" (Petition, para. 4; a copy of the mortgage is Exhibit "I" to the Petition). Appellees "Randall and Sullivan" are the Judges of the Massachusetts Land Court. (Petition, para. 2). The Massachusetts Land Court is a court of record created by Chapter 185 of the General Laws of the Commonwealth of Massachusetts.

On September 12, 1973 the Beatons commenced in the Plymouth Superior Court a proceeding to discharge and to redeem the mortgage given by them to "Quinoil". (Exhibit IV to Petition for Writ of Mandamus) "Quinoil" appeared and filed an Answer in the Plymouth proceeding. (Exhibit IV to Petition for Writ of Mandamus). On February 20, 1974 Quinoil commenced in the Land Court a Bill to foreclose the same mortgage upon which issue had been joined in the Plymouth Superior Court proceeding naming the Beatons as respondents. (Petition, para. 5; a copy of the Bill to Foreclose is Exhibit "II" to the Petition). In its Bill to Foreclose "Quinoil" prays: "1. For an order of notice ordering the respondents to appear and to answer this petition; 2. For a decree authorizing petitioner . . . to foreclose the mortgage described in paragraph 1 of this petition by a sale under the power of sale therein contained." The Bill to Foreclose makes no mention of the Bill to discharge and to redeem the mortgage pending in the Plymouth Superior Court. An order of notice was issued by the Land Court naming

the Beatons as respondents and was served on the Beatons. (Petition, para. 5; a copy of the order of notice is Exhibit "III" to Petition).

On April 8, 1974, the designated Land Court return day, the Beatons presented their Answer to the Bill to Foreclose to the Deputy Recorder of the Land Court, who immediately, without accepting the said Answer for filing, referred the answer to "the Judges of the Land Court". (Petition, para. 6).

On that same day "the Judges of the Land Court" denied the Beatons Motion with Answer attached that their Answer to the Bill to Foreclose be accepted for filing solely on the ground of St. 1959, c. 105 which provides as follows:

> "SECTION 1. The form of notice in section 1 of chapter 57 of the acts of 1943 is hereby amended by striking out the salutation or greeting and inserting in place thereof the following:—
> *To* (insert the names of all defendants named in the bill) *and to all persons entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended:*
>
> "SECTION 2. Said Section 1 of said chapter 57 is hereby further amended by adding at the end the following paragraph:—
>
> In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended with respect to the mortgage, trust deed or other security described in the bill whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of



> the act, is filed with the appearances. Such proceedings shall be limited to the issues of the existence of such persons and their rights, it any."

(Petition, para. 6, 7; the Motion with Answer attached is Exhibit "IV" to Petition). Paragraph (I) of "the is Exhibit "IV" to Petition). Paragraph (I) of the Beatons' Land Court Answer raised the federal question as follows:

> "I. The Unconstitutionality of St. 1959, c. 105
>
> The defendants Colin F. and Eleanor M. Beaton say that the provisions of St. 1959, c. 105 (and the order of notice herein issues pursuant to said statute) which purport to deprive named defendants of the right to appear and be heard, constitute an invasion of the rights of said defendants in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution."
>
> (Exhibit IV to Petition)

Paragraph II of the Beatons' Land Court Answer alleges that on September 12, 1973, approximately six months prior to the filing of the Bill to Foreclose in the Land Court, the Beatons filed in the Superior Court for Plymouth County a Bill in Equity to redeem and discharge the real estate mortgage in question and that Quinoil claims in the Land Court proceeding should be litigated in the Plymouth Superior Court proceeding.

Paragraph III of the Beatons' Land Court Answer alleges that there is no breach of condition of the mortgage and incorporates by reference the allegations of the Bill in Equity pending in the Plymouth Superior Court.

The Beatons subsequently filed in the Supreme Judicial Court for Suffolk County this Petition for a Writ of

Mandamus seeking an order to compel "the Judges of the Land Court" to cause to be accepted for filing as of April 8, 1974 their answer and to adjudicate the issues raised.

Paragraph 8 of the Petition raised the federal question as follows:

> "8. Petitioners hereby reiterate the claim asserted in their Land Court answer, that the provisions of St. 1959, c. 105 which purport to deprive named defendants of the right to appear and be heard, constitute an invasion of the rights of said defendants in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution."

"Quinoil" and "the Judges of the Land Court" each filed Demurrers and Answers. All proceedings in the Land Court were stayed by stipulation of "the Judges of the Land Court" pending determination of the Petition on the merits. After hearing the single justice entered an Order Sustaining the Demurrers. (A. 31) The Beatons appeal from the judgment of the Supreme Judicial Court for the Commonwealth entered on April 10, 1975 affirming that order. (A. 29).

## The Question Is Substantial

ST. 1943, SECTION 57, OF THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS AS AMENDED BY STATUTE 1959, C. 105, AS CONSTRUED BY THE COURT BELOW TO PROHIBIT A MORTGAGOR FROM APPEARING AND DEFENDING IN A PROCEEDING TO FORECLOSE A MORTGAGE ON HIS REAL ESTATE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Approximately *six months after* Colin Beaton and Eleanor Beaton, husband and wife, filed in the Massachusetts



Superior Court for Plymouth County, a Bill to discharge and to redeem a mortgage given by them to Quinoil on their residence in Bridgewater on October 10, 1966, Quinoil filed in the Massachusetts Land Court a Bill to Foreclose the same mortgage under the provisions of St. 1943, section 57 of the Laws of the Commonwealth of Massachusetts, as amended by St. 1959, c. 105. The Bill to Foreclose was totally silent as to the Bill pending in the Plymouth Superior Court to discharge and redeem the mortgage. The court below holds that the Beatons have no right to appear *for any purpose* in this subsequent Land Court proceeding. (1975 Mass. Adv. Sh. 1005, A. 24, 28).

To the extent the Court below suggests that the extraordinary limitation placed on the Beatons' appearance in the Land Court proceeding is compelled by The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. section 532, this is obviously not so. (A. 20, footnote 4). In fact, prior to the 1959 Amendment (St. 1959, c. 105) mortgagors not necessarily entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 are found appearing in such proceedings in the Superior Courts for the Commonwealth of Massachusetts, answering, and litigating varied defenses. *Lynn Institution for Savings* v. *Taff*, 314 Mass. 380; *State Realty Co. of Boston* v. *MacNeil Bros.*, 334 Mass. 294; *Piea Realty Co.* v. *Papuzynski*, 342 Mass. 240. It is the 1959 Amendment which, for the first time, purports to prohibit such appearances.

The Court below states that the Beatons have no right to appear or to raise defenses in this subsequent Land Court foreclosure proceeding because the Beatons are not soldiers or sailors and the proceeding is, under the terms of the 1959 amendment, limited to ". . . the existence of such persons (soldiers and sailors) and their rights, if any." (A. 20, 21).

Accepting this construction of St. 1943, section 57 as amended by St. 1959, c. 105, a vital property right of the Beatons is nevertheless affected. This is so because the Land Court foreclosure proceeding necessitates a judicial determination that a breach of condition of the mortgage given by the Beatons exists. The existence of and the status of that mortgage is the sine qua non of the proceeding.

The Bill to foreclose filed in the Land Court proceeding alleges, as it must, that such a breach of condition of the mortgage does in fact exist. (Petition for Writ of Mandamus, para. 5; the Bill to Foreclose is Exhibit "II" to the Petition). Without proof of and a judicial determination that there has been a breach of condition of the mortgage the Land Court proceeding, accepting the limited character ascribed to it by the state court, becomes a dangerous judicial exercise.

The comprehensive final decree to be entered in the Land Court proceeding furnishes clear evidence that such a determination of default is in fact made. Under the terms of St. 1943, section 57 the Recorder of the Land Court enters a decree authorizing and later a decree approving the sale of the Beatons' real estate. The pertinent provision of St. 1943, section 57 provides as follows:

> "Section 2. An entry and possession taken for the purpose of foreclosure, or a foreclosure effected by exercise of a power of sale or by any other method, or a seizure of property, done pursuant to authority granted in such proceedings, may be approved by the court but not until after the expiration of the period for appeal from the order authorizing the same. There shall be no appeal from or review of such approval."



The court below misapprehends Appellants' position when it states as follows:

> "The Petitioners, however, urge us to rule that St. 1959, c. 105, is unconstitutional as permitting a taking of property without due process of law. The argument seems to be that the state, by restricting the issues which may be raised in a proceeding under the statute solely to a determination of the existence of servicemen, and their rights under the 1940 Relief Act, denies a mortgagor the opportunity to appear and raise other defenses which might invalidate the foreclosure." (A. 22)

This statement is obviously too narrow a statement of the Beatons' position. Accepting the statement of the court below as to the limited nature of the issues raised, beyond the defenses which the Beatons seek to present by their proffered answer, there must be a determination in the Land Court proceeding as part of the mortgagee's prima facie case that the Beatons' mortgage is in fact in default. That determination, if no other, effects the Beatons' property right in the Bridgewater real estate and requires that the Beatons be heard on that issue, if on no other. In prohibiting the Beatons' appearance altogether, the court below mistakenly relies on decisions of this court upholding statutes providing for defendant's appearance on substantial but limited issues. (*e.g.*, to show payment of a mortgage or payment of rent) *Bianchi* v. *Morales*, 262 U.S. 170; *Lindsey* v. *Normet*, 405 U.S. 56. It is submitted that statutes affecting substantial rights while prohibiting defendant's appearance for any purpose clearly present a different case.

By its determination that there is in fact a breach of condition of the mortgage and by its contemplated decree

authorizing and then approving the sale of the Beatons' real estate in Bridgewater pursuant to said determination, the Land Court proceeding, accepting its limited character as defined by the court below, deprives the Beatons of a vital property right. *Fuentes* v. *Shevin,* 407 U.S. 75. This court is the final judge of whether the final decree to be entered in the Land Court proceeding under St. 1943, § 57 as amended affects a property right of the Beatons within the meaning of the Fourteenth Amendment.

The court below states that assuming a property right of the Beatons is affected, as it obviously is, the prohibition of the Beatons' appearance in the Land Court proceeding in any case raises no due process question because the Beatons will be afforded a hearing prior to foreclosure. The court below so insists despite its own holding that the Bill to foreclose may proceed in the Land Court without an opportunity to the Beatons to appear and despite the existence of a prior pending Bill to redeem and discharge the same mortgage:

> "This (restricting the Beatons from raising defenses in the Land Court proceeding), however is of no constitutional significance, since other adequate procedures are available to the mortgagors in the same or another forum *where these issues may be raised prior to the mortgagor's loss of his possessory or other important rights in the property subject to the mortgage.*" (our italics) (A. 24) . . . . .
>
> "We emphasize that the petitioner unquestionably have available methods of preventing foreclosure if they do in fact have a defense to foreclosure." (A. 26) . . . . .
>
> "Finally, we note that even if the mortgagor does violate the conditions of the mortgage, and the mortgagee commences foreclosure proceedings, the mortgagor still may redeem the mortgaged property and obtain an accounting by appropriate proceedings before the foreclosure is completed." (A. 27)



What the court below does not and cannot state is when and by what provisions of Chapter 244 of the General Laws of the Commonwealth of Massachusetts, St. 1943, § 57 as amended, or any other law of the Commonwealth of Massachusetts this prior hearing *must* take place. In fact, the construction placed on St. 1943, § 57 by the court below effectively precludes the sole procedure available under Massachusetts law on the facts of this particular case to *assure* that such a prior hearing takes place. The foreclosure of the Beatons' mortgage is initiated before the Bill to redeem and to discharge the mortgage pending in the Plymouth Superior Court can be heard.

The court below recognizes that a prior hearing is not *compelled* under any other law of the Commonwealth of Massachusetts. If a prior hearing were compelled there would obviously be no need for the injunctive relief in the prior Bill to redeem and discharge the mortgage pending in the Plymouth Superior Court to which the court below directs the Beatons. (A. 26). Such injunctive relief under Massachusetts law is, of course, purely discretionary and therefore cannot assure a prior hearing. *Yakus* v. *U. S.,* 321 U.S. 414; *Bendslev* v. *Commissioner of Public Safety,* 328 Mass. 443; *Martin* v. *Murphy,* 216 Mass. 466.

Aside from the discretionary character of injunctive relief, the procedural inadequacy of injunctive relief in due process terms was clearly recognized in *Turner* v. *Blackburn,* in which the court held that the North Carolina foreclosure state violated the due process clause as applied:

> "As to time of hearing, in this kind of case, which presents no extraordinary situation, the mortgagor must 'be given an opportunity for a hearing *before*

he is deprived of any significant property interest . . .' *Boddie, supra,* 401 U.S. at 379, 91 S.Ct. at 786 (footnote omitted). The right to submit an upset bid is obviously not a hearing. The extraordinary injunctive relief available under § 45-21.34 does not suffice because (1) the burden of proof is clearly on the mortgagor; (2) he most likely must show irreparable damage, as the inadequacy of the bid and (3) a condition precedent to relief is a bond providing for full indemnification. . . .'' *Turner* v. *Blackburn,* 389 F. Supp. 1250 (1975)

In *Turner* v. *Blackburn,* a divided three judge court held that due process required that a mortgagor be accorded a hearing prior to foreclosure. The decision of the court below conflicts with the decision in *Turner* v. *Blackburn.* Appellants are informed that an appeal has been taken to this Court from that decision. The decision below similarly conflicts with *Northrip* v. *Federal National Mortgage Association,* 372 F. Supp. 594 (1974) and *Gamer* v. *Tri-State Development Company,* 382 F. Supp. 377 (1974), which held that the advertising and sale provisions of the foreclosure statute of the State of Michigan violated due process as applied since no provision was made for a hearing prior to foreclosure.

The decision below obviously conflicts in principle with *Fuentes* v. *Shevin,* 407 U.S. 67 and *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337, in which this court found violative of due process state pre-judgment statutes which involved temporary takings and which ultimately provided for defendant's appearance and answer. The construction of St. 1959, c. 105 by the court below to prohibit the Beatons' appearance for any purpose in a judicial proceeding predicated on the existence of a default in a mortgage given by them similarly violates the



due process clause of the Fourteenth Amendment to the Constitution of the United States.

**Conclusion**

For the reasons stated above, the court should note jurisdiction and set the matter for argument.

Respectfully submitted,

DANIEL H. KELLEHER
73 Tremont Street
Boston, Massachusetts 02108
SAUL E. LIPNICK
18 Tremont Street
Boston, Massachusetts 02108
*Counsel for Appellants*

## APPENDIX A

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

No. 17

SUFFOLK COUNTY

RESCRIPT

AT BOSTON, April 10, 1975.

IN THE CASE OF
COLIN F. BEATON & another
*vs.*
LAND COURT & another
pending in the Supreme Judicial Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

Order affirmed. The respondents are to have double costs of appeal.

BY THE COURT,
FREDERICK J. QUINLAN, Clerk.

April 10, 1975.
Brief statement of the grounds and reasons of the decision: See opinion on file.

A true copy,
Attest:
FREDERICK J. QUINLAN, Clerk.

---



## APPENDIX B

COLIN F. BEATON ET AL.[1]
*v.*
LAND COURT ET AL.[2]

---

Supreme Judicial Court of Massachusetts,
Suffolk.

---

Argued Jan. 6, 1975.
Decided April 10, 1975.

Daniel H. Kelleher, Boston (Saul E. Lipnick, Boston, with him), for petitioners.

Blair L. Perry, Boston, for Quinoil Industries, Inc.

Robert H. Quinn, Atty. Gen., for the Land Court and others.

Before TAURO, C.J., and REARDON, QUIRICO, HENNESSEY and WILKINS, JJ.

QUIRICO, Justice.

This is an appeal by the petitioners from a May 16, 1974, order of a single justice of this court sustaining demurrers to a "Petition for Writ of Mandamus."[3] The appeal is utterly without merit. We briefly review the facts and proceedings leading to this appeal.

[1] According to the petition, the factual allegations of which are accepted as true when ruling on a demurrer,

---

[1] The other petitioner is Eleanor M. Beaton.

[2] The other respondent is Quinoil Industries, Inc.

[3] This petition was filed on April 17, 1974. Effective July 1, 1974, the writ of mandamus, along with many other writs, was abolished by our new rules of civil procedure, which govern proceedings before a single justice. Mass.R.Civ.P. 1, 1A, 81(b), ___ Mass. ___ (1974). As the Reporters' Notes to Rule 81(b) point out, however: "Burial of these antiques . . . does not mean elimination of the relief they afforded. It does mean that an application for such relief will henceforth be commenced like any other civil action under these rules, viz., by complaint and summons, with the former containing a prayer for the appropriate relief."

Slaney v. Westwood Auto, Inc., —— Mass. ——, ——[a] 322 N.E.2d 768 (1975), the petitioners owned certain land in Bridgewater. In 1966, they mortgaged this land to the respondent Quinoil Industries, Inc. (Quinoil). The mortgage provided: "This mortgage is upon the statutory condition . . . for any breach of which the mortgagee shall have the statutory power of sale." On February 20, 1974, Quinoil filed in the Land Court a document entitled "Bill to Foreclose Mortgage." Notice was then issued to the petitioners, certain specified other persons, and "to all persons entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended." This notice advised: "If you are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended and you object to such foreclosure you or your attorney should file a written appearance and answer in said court at Boston on or before the eighth day of April 1974, or you may be forever barred from claiming that such foreclosure is invalid under said act."

On April 8, 1974, the petitioners presented their purported answer to the bill to foreclose to the deputy recorder of the Land Court. Without accepting the answer for filing, the recorder referred it to the Judges of the Land Court (the Judges), whereupon the petitioners moved that their answer be accepted for filing. The Judges promptly denied this motion, solely on the ground of St. 1943, c. 57, as amended by St. 1945, c. 120, and St. 1959, c. 105. These statutes, in essence, establish a proceeding to satisfy the requirements of the Soldiers' and Sailors' Civil Relief Act of 1940 (the 1940 Relief Act), now 50 U.S.C. Appendix, § 501 et seq. (1970),[4] as amended. The statutes

[a] Mass.Adv.Sh. (1975) 175, 176.

[4] The Soldiers' and Sailors' Civil Relief Act of 1940 was enacted by Congress after the outbreak of World War II and at a time when the United States, although not then a belligerent, was engaged in a massive increase of its armed forces. Before World War II ended, over sixteen million men and women had served in the armed forces of the country during the war years. The 1940 Relief Act, adopted as a war emergency measure, was not repealed at the end of the war, and has continued in effect during all the thirty-five years to the present time. As a result every mortgage of real estate foreclosed in that period has necessitated the pre-foreclosure equity proceeding prescribed by St.1943, c. 57, as amended, adding both to the time and cost of each foreclosure. Although statistics are not available to us, it seems safe to say that the number of foreclosures which affect property interests of persons in the armed forces is currently minimal. Nevertheless, so long as the 1940 Relief Act continues in effect, the Commonwealth is not at liberty to eliminate pre-foreclosure proceedings to ascertain whether interested parties are in, or have just been released from, the service.



further provide that in such proceedings notice such as that sent to the petitioners must be issued to various concerned persons. By virtue of St. 1959, c. 105, § 2, "In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, . . . whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of the act, is filed with the appearances. Such proceedings shall be limited to the issues of the existence of such persons and their rights, if any." After their motion was denied, the petitioners sought a writ of mandamus, naming the Judges and Quinoil as respondents, to compel the Judges to cause the answer to be accepted for filing. Both respondents demurred to the petition. The single justice, ruling that in view of the provisions of St. 1959, c. 105, § 2, it would be futile to order the acceptance of the petitioners' answer, sustained the demurrers.

The answer which the petitioners attempted to file in the Land Court does not assert that the petitioners or any other concerned parties are entitled to the protection of the 1940 Relief Act. Neither does the answer raise the

issues of the existence of any such persons or of their rights.[5] Plainly, therefore, at least as far as the statutes are concerned, the Judges acted properly in denying the motion to compel the recorder to accept the answer. Equally plainly, as far as the statutes are concerned, the single justice properly sustained the demurrers to the petition for a writ of mandamus.

The petitioners, however, urge us to rule that St.1959, c. 105, is unconstitutional as permitting a taking of property without due process of law. Their argument seems to be that the statute, by restricting the issues which may be raised in a proceeding under the statute solely to a determination of the existence of servicemen, and their rights under the 1940 Relief Act, denies a mortgagor the opportunity to appear and raise other defenses which might invalidate the foreclosure. Without previously citing, much less discussing, a single case bearing on the due process limitations on the taking of an individual's property in this or any other context, the petitioners state: "Given the contemplated entry of a final decree in the Land Court proceeding authorizing the sale of 'the Beatons' real estate, the violation of due process in refusing to accept the Answer of 'the Beatons' for filing is so clear as to render unnecessary extensive discussion of less grievous due process violations recently found in summary state pre-judgment attachment, replevin and garnishment statutes which involved only 'temporary takings' and which ultimately provided for defendant's appearance and

[5] The answer which the petitioners attempted to file in the Land Court contained three matters: (a) a claim that St.1959, c. 105, and the order of notice issued thereunder are unconstitutional; (b) a defense that a bill in equity to redeem and discharge the mortgage had been filed by the petitioners' and was pending in the Plymouth Superior Court; and (c) a defense that there had been no breach of condition of the mortgage. The answer also purported to incorporate by reference all the multifarious claims raised in the bill in equity previously filed in the Plymouth Superior Court.



answer. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 [1972]; Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 [1969].... Given the clear violation of due process, it is not necessary to argue at length that the distinction created by the statute between those who are allowed to appear and to answer and those who are not is not reasonable and violates the equal protection clause of the Fourteenth Amendment. Fiorentino v. Probate Court, — Mass. —,[b] 309 N.E.2d 533 (1974).

[2] The conclusory nature of the petitioners' brief is such that it is doubtful whether it complies with the rule that the argument in an appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Mass.R.A.P. 16(a)(4) — Mass. — (1974). While the petitioners, as appellants, are not entitled to have issues not argued in the brief considered by this court, see Commonwealth v. Bernier, — Mass. —,[c] 322 N.E.2d 789 (1975), we nevertheless take this opportunity to point out the basic defects in their contentions.

[3, 4] The pertinent provision of the 1940 Relief Act, 50 U.S.C. Appendix, §532(3) (1970), renders the foreclosure of a mortgage after October 6, 1942, invalid in so far as it purports to cut off rights of a person in the military service or recently discharged therefrom unless that person has executed a proper waiver of his rights or the foreclosure is made "upon an order previously granted by the court and a return thereto made and approved by the court." The point to be made here is that actions taken to comply with the 1940 Relief Act, such as the steps prescribed by St.1943, c. 57, as amended, are not

[b] Mass.Adv.Sh. (1974) 403.
[c] Mass.Adv.Sh. (1975) 221, 226.

in themselves mortgage foreclosure proceedings in any ordinary sense. Rather, they occur independently of the actual foreclosure itself and of any judicial proceedings determinative of the general validity of the foreclosure. Statute 1943, c. 57, as amended, simply establishes procedures whereby mortgagees, in addition to taking all steps necessary to foreclose, can make certain that there will be no cloud on the title following the foreclosure as a result of an interested party having been in, or just released from, military service and thus under the protective umbrella of the 1940 Relief Act. See Lynn Inst. for Sav. v. Taff, 314 Mass. 380, 386, 50 N.E.2d 203 (1943). If a foreclosure were otherwise properly made, failure to comply with the 1940 Relief Act would not render the foreclosure invalid as to anyone not entitled to the protection of that act. Guleserian v. Pilgrim Trust Co., 331 Mass. 431, 433-434, 120 N.E.2d 193 (1954). See Park, Conveyancing, § 406 (1968 and Supp.1974).

[5] In view of the limited purpose of proceedings under the 1940 Relief Act, it is evident why it was appropriate for the Legislature, by St.1959, c. 105, to limit access to such proceedings to persons entitled to the benefits of the act or to persons appearing on their behalf, and to limit the issues in such proceedings to the existence of such persons and their rights, if any. It is true that these restrictions may prevent mortgagors from raising in these particular proceedings many meritorious issues pertaining to the mortgagee's ultimate right to foreclose. This, however, is of no constitutional significance, since other adequate procedures are available to the mortgagor in the same or another forum where these issues may be raised prior to the mortgagor's loss of his possessory or other important rights in the property subject to the mortgage. In other words, mandatory procedural segregation of various aspects of related claims or defenses is constitutionally



permissible so long as all the available procedures combined satisfy the mandates of the due process clause. Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133, 35 S.Ct. 279, 59 L.Ed. 501 (1915) (upholding a Louisiana statute which prohibited the defendant in a possessory suit from bringing an action to try title until after the judgment was rendered and satisfied in the possessory action). Bianchi v. Morales, 262 U.S. 170, 43 S.Ct. 526, 67 L.Ed. 928 (1923) (upholding a Puerto Rico mortgage statute permitting a summary possessory suit by a mortgagee in which no defense except payment was generally permitted). Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (upholding an Oregon statute which, in essence, restricted a tenant-defendant in a landlord's possessory action based on nonpayment of rent to the defense of payment).

As just noted, the recent *Lindsey* decision upheld a statute which prohibited a tenant from raising any defense but payment when sued by the landlord in a possessory action based on nonpayment of rent. The Supreme Court said that Oregon does not "deny due process of law by restricting the issues in . . . [the statutory] actions to whether the tenant has paid rent . . . The tenant is barred from raising claims in the . . . [statutory] action that the landlord has failed to maintain the premises, but the landlord is also barred from . . . asserting other claims against the tenant. The tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action." 405 U.S. at 65-66, 92 S.Ct. at 870 (1972). The effect of the Oregon statute upheld in the *Lindsey* case was to prevent a tenant from raising many possible defenses in an action which could result in his being deprived of a fundamental, vital property interest—the possession of a dwelling or place of business. The effect of the Massachusetts legislation here at issue is, by contrast, merely to prevent a mortgagor from

raising certain defenses in an action which can result only in a determination that interested parties are not entitled to the limited benefits of the servicemen's protective statute.

[6-8] We emphasize that the petitioners unquestionably have available methods of preventing foreclosure if they do in fact have a defense to foreclosure. The answer the petitioners attempted to file in the Land Court purported to incorporate by reference a bill in equity filed in the Plymouth Superior Court. See fn. 5, *supra*. This bill in equity seems to assert, among other things, that the actions of the mortgagee Quinoil, in connection with certain business transactions which allegedly served as the basis for the execution of the mortgage, constituted actionable fraud. One element of the relief sought from this alleged fraud is that Quinoil be ordered to discharge the mortgage and that the petitioners be relieved of any personal liability to the respondent Quinoil. While we have no intention of here ruling on the adequacy of this bill, we do note that a court acting under general principles of equity jurisprudence has broad power to reform, rescind, or cancel written instruments, including mortgages, on grounds such as fraud, mistake, accident, or illegality. Rice v. Winslow, 182 Mass. 273, 275-276, 65 N.E. 366 (1902). Hermanson v. Seppala, 255 Mass. 607, 610, 152 N.E. 363 (1926). Brodie v. Evirs, 313 Mass. 741, 744, 49 N.E.2d 218 (1943). If the obligation underlying the mortgage has been paid or otherwise discharged, the mortgagor may maintain a suit to compel the cancellation of the note and a discharge of the mortgage in a form appropriate for recording. Perry v. Oliver, 317 Mass. 538, 541, 59 N.E.2d 192 (1945). If a mortgagee begins the process of foreclosure, a suit in the Superior Court will lie to enjoin the foreclosure and to obtain an accounting. In such a suit, the issue whether the mortgage conditions have been violated may be litigated. McCombs v. Elmes, 197 Mass. 19, 21-22, 83 N.E. 306



(1907). See Newman v. Greenberg, — Mass. —,[d] 281 N.E. 2d 590 (1972).

[9] It does not appear possible in this Commonwealth that a foreclosure could ever be made without the mortgagor's having first received some form of notice of the proposed foreclosure and an opportunity to oppose it. If the foreclosure is to be by exercise of a power of sale, G.L. c. 244, § 14, provides that notice of the proposed sale must first be published in a local newspaper once a week for three successive weeks prior to the date of the sale. If the foreclosure is to be by entry for breach of condition, it will not be completed until three years have passed from the date of a peaceable, unopposed entry, and a certificate of entry must be recorded in the registry of deeds within thirty days from the date of entry. G.L. c. 244, §§ 1, 2. If the foreclosure is to be by action under G.L. c. 244, §§ 3, 4, a method rarely used, the ordinary procedural rules, including those pertaining to service of process, which govern all actions would of course apply. As this case demonstrates, moreover, St.1943, c. 57, as amended, itself effectively assures that mortgagors receive personal notification of impending foreclosures. Finally, we note that even if the mortgagor does violate the conditions of the mortgage and the mortgagee commences foreclosure proceedings, the mortgagor still may redeem the mortgaged property and obtain an accounting by appropriate proceedings before the foreclosure is completed. G.L. c. 244, §§ 18-36.[6] Indeed,

---

[d] Mass.Adv.Sh. (1972) 771.

[6] No lack of notice or absence of opportunity to defend against the foreclosure is involved in this case and our discussion above suggests that a case presenting issues of such lack of notice or absence of opportunity to be heard in defense is unlikely to arise. Only if and when such a case arises would we have occasion to determine whether the due process clause even has any applicability to non-judicial mortgage foreclosures (i.e., those conducted by entry or by exercise of a power of sale), which follow private contractual provisions or the course of the common law. The substantial and growing weight

the petitioners have already brought an action in the Plymouth Superior Court, inter alia, an order that the mortgage be discharged. There would seem to be no obstacle to the filing of a motion to amend the presently pending action against Quinoil to seek an injunction against the foreclosure sale.

[10] The order appealed from is affirmed. The appeal being without merit and having accomplished no purpose except delay, the respondents are to have double costs of appeal.

So ordered.

---

of authority in apparently analogous areas suggests that in fact no "state action" is present in such foreclosures. See, for example, Jackson v. Metropolitan Edison Co., ___ U.S. ___, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), (utility service termination); Bichel Optical Labs. v. Marquette Natl. Bank, 487 F.2d 906 (8th Cir. 1973) (self-help repossession under the Uniform Commercial Code); Adams v. Southern Cal. First Natl. Bank, 492 F.2d 324 (9th Cir. 1973) (repossession); Shirley v. State Natl. Bank, 493 F.2d 739 (2d Cir. 1974) (repossession); Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974) (wage assignments); Nowlin Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974) (repossession); Fletcher v. Rhode Island Hosp. Trust Natl. Bank, 496 F.2d 927 (1st Cir. 1974) (bank setting of customers' deposits against indebtedness); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974) (repossession). Some authority, now apparently dwindling, does exist which finds "state action" in various self-help procedures. See, for example, Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) (landlords' liens); Boland v. Essex County Bank & Trust Co., 361 F.Supp. 917 (D.Mass.1973) (repossession). In one very recent case, Turner v. Blackburn, 389 F.Supp. 1250 (D.N.C.1975), a divided three-judge Federal court held that North Carolina's power of sale mortgage foreclosure proceedings constitute "state action." This holding appears to be based on a provision of the North Carolina law requiring a report of the sale to be filed with the clerk of the county court and to be audited and approved by him. A result contrary to that in Turner v. Blackburn, supra, was subsequently reached in Armeta v. Nussbaum, 519 S.W.2d 673 (Tex.Civ.App. 1975), where the court held that there was no "state action" in a mortgagee's power of sale under a Texas deed of trust.

---



## APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

---

SUFFOLK COUNTY
No. 017

---

COLIN F. BEATON and ELEANOR M. BEATON
*v.*
JUDGES OF THE LAND COURT, et al

---

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Colin Beaton and Eleanor Beaton, the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Judicial Court of Massachusetts, affirming the order sustaining Demurrers, entered on April 10, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

By their attorney,
(s) DANIEL H. KELLEHER
DANIEL H. KELLEHER
73 Tremont Street
Boston, MA 02108
617/523-1310

CERTIFICATE OF SERVICE

I, Daniel H. Kelleher certify that on June 5, 1975 I served a copy of the foregoing Notice of Appeal on the Judges of the Land Court by mailing a copy, United States first class mail, postage prepaid to their counsel of record, Francis X. Bellotti, Attorney General, State House, Boston, Massachusetts and on Quinoil Industries, Inc. by

mailing a copy, United States first class mail, postage prepaid to its counsel of record, David Mortensen, Hale and Dorr, 28 State Street, Boston, Massachusetts. All parties required to be served have been served.

(s) DANIEL H. KELLEHER
DANIEL H. KELLEHER

Received
Supreme Judicial Court
for the Commonwealth
FREDERICK J. QUINLAN, *Clerk*
June 5, 1975



## APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. No. 74-125 LAW

COLIN F. BEATON
and ELEANOR M. BEATON
*v.*
JUDGES OF THE LAND COURT, ET AL.

### ORDER SUSTAINING DEMURRERS

This matter came on for hearing on May 15, 1974, upon the demurrers of the respondents, and was argued by counsel. It appeared that by St. 1943, c. 57, §1, last sentence, as added by St. 1959, c. 105, §2, the proceedings in the Land Court are "limited to the issues of the existence of such persons [entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940] and their rights, if any." It would therefore be futile to order the acceptance for filing of an answer raising other issues. It is therefore ORDERED that the demurrers be, and they hereby are, sustained.

By the Court, (BRAUCHER, J.)
(s) JOHN E. POWERS, *Clerk*

Entered: May 16, 1974

Supreme Court, U. S.
FILED
AUG 2 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-34

COLIN F. BEATON and ELEANOR M. BEATON,
APPELLANTS,

*v.*

WILLIAM I. RANDALL and MARILYN M. SULLIVAN, as they are the duly appointed Judges of the Land Court of the Commonwealth of Massachusetts, and QUINOIL INDUSTRIES, INC.,
APPELLEES.

**ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS**

## MOTION TO DISMISS OR TO AFFIRM OF THE APPELLEES, JUDGES OF THE LAND COURT OF THE COMMONWEALTH OF MASSACHUSETTS

FRANCIS X. BELLOTTI
*Attorney General*
S. STEPHEN ROSENFELD
*Assistant Attorney General*
JAMES R. ADAMS
*Assistant Attorney General*
JOHN F. HURLEY
*Assistant Attorney General*
Room 373, State House
Boston, Massachusetts 02133
(617) 727-2260

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Constitutional Provisions and Statutes Involved | 2 |
| Question Presented | 7 |
| Statement of the Case | 8 |
| Argument | 9 |
| The Decision of the Supreme Judicial Court of the Commonwealth of Massachusetts Is Clearly Correct and Does Not Raise a Substantial Federal Question | 9 |
| I. Proceedings in the Massachusetts Land Court Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 Do Not Deprive Appellants of Any Property Interests Protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution | 9 |
| II. Massachusetts' Limitation on Proceedings Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 to Issues Raised by That Act Does Not Deprive Appellants of Due Process of Law | 13 |
| A. Appellants have an opportunity to be heard on all defenses to foreclosure as a matter of Massachusetts law | 13 |
| B. Procedural segregation of determination of the existence of persons entitled to the protection of the Soldiers' and Sailors' Civil Relief Act of 1940 from determination of the merits of a foreclosure does not deprive Appellants of Due Process of Law | 14 |
| Conclusion | 16 |

## Table of Citations

### *Cases*


| | Page |
|---|---|
| *Beaton* v. *Land Court,* Mass. Adv. Sh. (1975) 1005, 326 N.E. 2d 302 (1975) | 1, 9, 12, 13, 14, 16 |
| *Bianchi* v. *Morales,* 262 U.S. 170 (1923) | 15, 16 |
| *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972) | 12 |
| *Brodie* v. *Evirs,* 313 Mass. 741, 49 N.E. 2d 218 (1943) | 13 |
| *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) | 15 |
| *Grant Timber Co.* v. *Gray,* 236 U.S. 133 (1915) | 15 |
| *Hermanson* v. *Seppalla,* 255 Mass. 607, 152 N.E. 363 (1926) | 13 |
| *Inland Empire Council* v. *Millis,* 325 U.S. 697 (1945) | 14 |
| *Iowa Central Ry.* v. *Iowa,* 160 U.S. 389 (1898) | 14 |
| *Lindsey* v. *Normet,* 405 U.S. 56 (1972) | 15 |
| *McCombs* v. *Elmes,* 197 Mass. 19, 83 N.E. 306 (1907) | 13 |
| *NLRB* v. *Mackay Co.,* 304 U.S. 333 (1938) | 14 |
| *Newman* v. *Greenberg,* Mass. Adv. Sh. (1972) 771, 281 N.E. 2d 590 (1972) | 13 |
| *Perry* v. *Oliver,* 317 Mass. 538, 59 N.E. 2d 192 (1945) | 13 |
| *Rice* v. *Winslow,* 182 Mass. 273, 65 N.E. 366 (1902) | 13 |
| *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969) | 15 |
| *Turner* v. *Blackburn,* 389 F. Supp. 1250 (W.D.N.C. 1975) | 14 |


### *Constitutional Provisions*


| | |
|---|---|
| U.S. Const. Amend. XIV, § 1 | 2, 8, 9, 14 |


### *Federal Statutes*


| | |
|---|---|
| 50 U.S.C. App. § 501 *et seq.* (1970) | 7, 8, 9 |
| § 532 (1970) | 2, 9 |




### *Massachusetts Statutes*


| | Page |
|---|---|
| St. 1941, c. 25 | 11 |
| St. 1943, c. 57 | 4, 11 |
| St. 1945, c. 120, § 1 | 11 |
| St. 1959, c. 105 | 7, 9, 11 |

# In the
# Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-34

---

COLIN F. BEATON and ELEANOR M. BEATON,
APPELLANTS,

*v.*

WILLIAM I. RANDALL and MARILYN M. SULLIVAN,
as they are the duly appointed Judges of the Land Court
of the Commonwealth of Massachusetts, and
QUINOIL INDUSTRIES, INC.,
APPELLEES.

---

**ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS**

---

**MOTION TO DISMISS OR TO AFFIRM OF THE APPELLEES, JUDGES OF THE LAND COURT OF THE COMMONWEALTH OF MASSACHUSETTS**

---

## Opinion Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is officially reported at Mass. Adv. Sh. (1975) 1005 and unofficially reported at 326 N.E.2d 302. (Appellants App. 10-28).

## Jurisdiction

The order of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on April 10, 1975. A Notice of Appeal to this Court was filed in the Supreme Judicial Court for the Commonwealth of Massachusetts by Appellants on June 5, 1975. However, this Court is without jurisdiction under the provisions of 28 U.S.C. § 1257(2) in that this appeal does not give rise to a substantial federal question.

## Constitutional Provisions and Statutes Involved

### Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### United States Statutes

50 U.S.C. App. § 532 (1970)

(1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him which obligations originated prior to such person's period of military service.



(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) stay the proceedings as provided in this Act [sections 501-548 and 560-590 of this Appendix]; or

(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [Oct. 6, 1942] and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107 [section 517 of this Appendix], unless upon an order previously granted by the court and a return thereto made and approved by the court.

(4) Any person who shall knowingly make or cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3) hereof, or attempts so to do, shall be guilty of a misdemeanor and shall be

punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.

MASSACHUSETTS STATUTES

Mass. St. 1943, c. 57, §§ 1-3, as amended by Mass. St. 1945, c. 120, § 1:

"SECTION 1. In any proceeding in equity for authority to foreclose a mortgage, which for the purposes of this act shall be construed to include a trust deed, or other security in the nature of a mortgage, covering real or personal property, or both, by entry and possession, by exercise of a power of sale contained therein, or otherwise as provided by law, or to make any seizure of property thereunder, brought because of an Act of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, or any amendments thereto hereafter enacted, notice may be issued in substantially the following form by the court in which such proceeding is pending, returnable on any convenient date, irrespective of the return days otherwise prescribed by law or rule, and requiring all appearances and answers to be filed on or before the return day:—

"COMMONWEALTH OF MASSACHUSETTS

———— Court

————, ss In Equity

To (*insert the names of all defendants named in the bill*) and to all it may concern:

"———— claiming to be the holder of a mortgage — trust deed — security in the nature of a mortgage (*strike out the descriptive words which are inapplicable*) covering — property (*insert nature of property, whether real or personal*) situated in (*insert location of property, including name of city or*



*town and, if stated in the mortgage or in the bill, the street and number*) given by (*insert names of parties, date and reference to record*), has filed with said court a bill in equity for authority to foreclose said mortgage — trust deed — security in the nature of a mortgage — in the manner following: (*insert contemplated method of foreclosure, whether by entry and possession, exercise of a power of sale, or otherwise*) — to seize certain real — personal — property (*strike out descriptive word which is inapplicable*) covered by said mortgage — trust deed — security in the nature of a mortgage.

"If you are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, and you object to such foreclosure or seizure, you or your attorney should file a written appearance and answer in said court at ———— on or before ———— (Return Day), or you may be forever barred from claiming that such foreclosure or seizure is invalid under said act.

"Witness ———— Esquire, Judge of said Court, this ———— day of ————, 19——.

"The publication of a copy of said notice once not less than twenty-one days before the return day in a newspaper designated by the court, and the mailing of a copy thereof by registered mail not less than fourteen days before the return day to each defendant named in the bill, shall be sufficient service of said notice, unless the court otherwise orders, provided however that prior to the return day fixed in said notice, or within such further time before decree as the court may allow, a copy thereof shall be recorded in each registry of deeds and city or town clerks office in which such mortgage is recorded.

"Section 2. An entry and possession taken for the purpose of foreclosure, or a foreclosure effected by exercise of a power of sale or by any other method, or a seizure of property, done pursuant to authority granted in such proceedings, may be approved by the court but not until after the expiration of the period for appeal from the order authorizing the same. There shall be no appeal from or review of such approval.

"The period of thirty days within which a copy of the notice of sale and an affidavit are required to be recorded by section fifteen of chapter two hundred and forty-four of the General Laws, and the period of thirty days within which the memorandum or certificate of entry is required to be recorded by section two of said chapter two hundred and forty-four shall, in case such a proceeding has been had, be computed from the time the court approves the sale, or entry, rather than from the time of the sale, or entry, as provided in said sections.

"A copy of the order authorizing foreclosure by entry, or by sale, or otherwise as provided by law, or a copy of the order authorizing the seizure of property, and the approval thereof, may be recorded in the registry of deeds and city or town clerk's office in which such mortgage is recorded, and if so recorded shall be conclusive evidence of compliance with the provisions of said Soldiers' and Sailors' Civil Relief Act of 1940, and any amendments thereto, insofar as the court has power to determine the same, as against all persons, except that such copy shall not be conclusive evidence of such compliance against persons whose interests appeared of record prior to the recording of the notice of said proceedings unless they were named as defendants or had notice of said proceeding.

"Section 3. In proceedings under section one hereof where a mortgage includes land, the land court shall have jurisdiction as to said mortgage even though it may include



personal property and shall have jurisdiction as to any additional or supplementary mortgage securing the same obligation although such mortgages include personal property."

Mass. St. 1959, c. 105, amending Mass. St. 1943, c. 57:

Section 1. The form of notice in section 1 of chapter 57 of the acts of 1943 is hereby amended by striking out the salutation or greeting and inserting in place thereof the following:—

*To* (insert the names of all defendants named in the bill) *and to all persons entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended:*

Section 2. Said section 1 of said chapter 57 is hereby further amended by adding at the end the following paragraph:—

In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, with respect to the mortgage, trust deed or other security described in the bill whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of the act, is filed with the appearances. Such proceedings shall be limited to the issues of the existence of such persons and their rights, if any.

## Question Presented

Whether St. 1959, c. 105 of the Laws of the Commonwealth of Massachusetts, which limits proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. App. § 501 *et seq.* (1970), to an inquiry solely into the existence and rights of any persons pro-

tected by that act, violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

**Statement of the Case**

On October 10, 1966 Appellants (hereinafter "the Beatons") mortgaged certain land in Bridgewater, Massachusetts to Appellee Quincy Oil Company, presently Quinoil Industries, Inc. (hereinafter "Quinoil") [Appellants' App. 20]. On February 20, 1974 Quinoil filed a document entitled "Bill to Foreclose Mortgage" in the Massachusetts Land Court in order to comply with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended 50 U.S.C. App. § 501 et seq. (1970) (hereinafter the "Relief Act"). [Appellants' App. 28]. The Beatons attempted to file an Answer which did not allege that they were protected by the Relief Act, but which instead related to the merits of the foreclosure itself, and included a purported incorporation by reference of a pending bill in equity to discharge and redeem the mortgage. [Appellants' App. 20, 21, 26].

Without accepting the Answer, the deputy recorder of the state Land Court referred it to Appellees, Judges of the Land Court, at which point the Beatons moved that their Answer be accepted for filing. [Appellants' App. 20]. The Judges denied this motion in accordance with St. 1959, c. 105, which limits the scope of the Land Court proceeding to determination of the existence and rights of persons protected by the Relief Act. [Appellants' App. 20]. The Beatons thereupon brought a petition for writ of mandamus before the Single Justice of the Supreme Judicial Court of Massachusetts. The Petition sought to compel the Appellees, Judges of the Land Court, to accept the Answer for filing and to adjudicate any issues raised by the Answer. All Appellees filed demurrers. The Single Justice entered an Order Sustaining Demurrers. [Appellants' App. 31]. The decision of the Single Justice was affirmed on appeal to the Supreme Judicial Court of Massachusetts. [Appellants' App. 25]. The Supreme Judicial Court, emphasizing the extremely limited effect of the pending Land Court proceeding, rejected as "utterly without merit" the Beatons' contention that the application of St. 1959, c. 105 permits the taking of property without due process of law. [Appellants' App. 19-28]. The Beatons then filed this appeal. [Appellants' App. 29-30].



**Argument**

## THE DECISION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS IS CLEARLY CORRECT AND DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

### I. Proceedings in the Massachusetts Land Court Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 Do Not Deprive Appellants of Any Property Interests Protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Congress passed the Soldiers' and Sailors' Civil Relief Act of 1940, now 50 U.S.C. App. § 501 *et seq.* (1970), in order to protect the vast number of people then entering the armed services from certain civil liabilities.[1] One benefit which this act confers on members of the military is temporary protection from mortgage foreclosure actions. 50 U.S.C. App. §532 provides in pertinent part:

---

[1] This legislation was enacted shortly after the outbreak of World War II when the United States, although not yet a belligerent, was engaged in a massive buildup of its armed forces. Beaton v. Land Court, Mass. Adv. Sh. (1975) 1005, 1007 n.4, 326 N.E.2d 302, 304 (1975).

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) stay the proceedings as provided in this Act [sections 501-548 and 560-590 of this Appendix]; or

(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [Oct. 6, 1942] and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107 [section 517 of this Appendix], unless upon an order previously granted by the court and a return thereto made and approved by the court.

The Relief Act, then, permits a stay of foreclosure proceedings brought to enforce obligations of persons entitled



to protection of the Act. The Act, however, does not purport to affect the validity of mortgage foreclosure proceedings involving persons not entitled to the benefits of the Act.

Soon after passage of the Relief Act, the General Court of Massachusetts, in order to implement the Act, enacted Chapter 25 of the Acts of 1941, later replaced by Chapter 57 of the Acts of 1943, and subsequently amended by Chapter 120 of the Acts of 1945, so as to remain consistent with the Relief Act. The Massachusetts Act dealt primarily with the forms of notice required in equitable suits to foreclose brought pursuant to the Relief Act. Subsequently, the Act was amended once again. Mass. St. 1959, c. 105. Section 2 of Chapter 105 of the Acts of 1959 provides that the following paragraph be added to Section 1 of Chapter 57 of the Acts of 1943:

> In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, with respect to the mortgage, trust deed or other security described in the bill whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of the act, is filed with the appearances. Such proceedings shall be limited to the issues of the existence of such persons and their rights, if any.

The composite effect of these statutes is procedural, not substantive. They neither enhance nor diminish any substantive rights created by the Relief Act; rather, they merely prescribe the manner in which such rights are adjudicated in the Commonwealth of Massachusetts.

The effect of an action to foreclose, brought pursuant to the Relief Act and in accordance with the Massachusetts procedural statutes, is extremely limited. Such an action adjudicates only the existence (or lack thereof) of persons entitled to protection of the Relief Act. As the Supreme Judicial Court noted, the challenged procedure is not determinative of the general validity of the foreclosure under Massachusetts law. *Beaton* v. *Land Court*, Mass. Adv. Sh. (1975) 1005, 1012, 326 N.E. 2d 302, 305 (1975). Such an action "simply allows mortgagees, in addition to taking all steps necessary to foreclose, [to] make certain that there will be no cloud on the title following foreclosure as a result of an interested party having been in, or just released from, military service and thus under the protective umbrella of the 1940 Relief Act." *Id.* Accordingly, the only "property right" which could be lost even potentially as a result of such an action is the right to avail oneself of the protection provided by the Relief Act. The Beatons, of course, do not assert that they are entitled to such protection. Their claim is, rather, based on the misconception that the challenged proceedings involve a determination by the Judges of the Land Court that a breach of condition of the mortgage has in fact occurred. The Court's opinion makes it clear that the Judges of the Land Court do not make such a determination, but rather only adjudicate the issue of the existence or non-existence of persons entitled to the benefits of the Relief Act—without regard to the merits of the foreclosure or of any alleged defenses which the mortgagor might assert. *Id.* The Beatons' assertion that adjudication of an action brought pursuant to the Relief Act in the manner dictated by Massachusetts law deprives them of any property interests is therefore without merit. The Beatons will not be deprived of any property under the Relief Act and, therefore, their Jurisdictional Statement does not raise a substantial



federal question. *See generally, Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972).

## II. Massachusetts' Limitation on Proceedings Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 to Issues Raised by That Act Does Not Deprive Appellants of Due Process of Law.

### A. *Appellants will have an opportunity to be heard on all defenses to foreclosure as a matter of Massachusetts law.*

Foreclosure itself obviously involves loss of property. However, Massachusetts foreclosure procedures, unchallenged by the Beatons, unquestionably allow a mortgagor an opportunity to present all available defenses to foreclosure. *Beaton* v. *Land Court, supra* at 1016, 326 N.E.2d at 307; *see Newman* v. *Greenberg,* Mass. Adv. Sh. (1972) 771, 281 N.E. 2d 590 (1972). In such a case, the issue whether the mortgage conditions have been violated may be litigated. *McCombs* v. *Elmes,* 197 Mass. 19, 21-22, 83 N.E. 306 (1907). If the debt underlying the mortgage has been discharged the mortgagor may seek cancellation of the note and discharge of the mortgage. *Perry* v. *Oliver,* 317 Mass. 538, 541, 59 N.E. 2d 192, 193 (1945). In general, as the Supreme Judicial Court clearly stated, the Massachusetts courts may reform, rescind, or cancel written instruments, including mortgages, on grounds such as fraud, mistake, accident, or illegality. *Beaton* v. *Land Court, supra* at 1016, 326 N.E. 2d at 307. *See, e.g., Brodie* v. *Evirs,* 313 Mass. 741, 43 N.E. 2d 218 (1943); *Hermanson* v. *Seppalla,* 255 Mass. 607, 152 N.E. 2d 363 (1926); *Rice* v. *Winslow,* 182 Mass. 273, 65 N.E. 366 (1902).

It is important to note that the Beatons have not challenged the adequacy of defenses and relief available to them under Massachusetts law. They have only challenged

the procedural segregation of these defenses from the Relief Act proceedings.[2] Accordingly, the only issue before the Supreme Judicial Court was whether that procedural segregation is constitutional. However, the Court's opinion makes it clear that under Massachusetts law the Beatons will have the opportunity to be heard regarding the validity of the foreclosure. *Beaton* v. *Land Court, supra* at 1015-17, 362 N.E. 2d at 306-307.

B. *Procedural segregation of determination of the existence of persons entitled to the protection of the Soldiers' and Sailors' Civil Relief Act of 1940 from determination of the merits of a foreclosure does not deprive Appellants of Due Process of Law.*

The Beatons assert the right to present certain defenses to foreclosure of their real estate. With this proposition there can be no argument. Indeed, as described above, they have the opportunity to raise all possible defenses. The Beatons, though, insist on the right to raise their defenses in a proceeding which is statutorily limited to an adjudication of one set of facts and from which all other issues are excluded. They do not have this right. This Court has repeatedly held that the Fourteenth Amendment does not give litigants the right to demand one form of proceeding in which to present claims or defenses over another. *Inland Empire Council* v. *Millis,* 325 U.S. 697, 710 (1945); *NLRB* v. *Mackay Co.,* 304 U.S. 333, 351 (1938); *Iowa Central Ry.* v. *Iowa,* 160 U.S. 389, 393 (1898).

[2] Thus the case of *Turner* v. *Blackburn*, 389 F. Supp. 1250 (W.D. N.C. 1975), upon which the Beatons rely, is inapposite. The district court in *Turner* was faced with a direct challenge to North Carolina's statutory procedure for foreclosure itself. The challenged statute here, on the other hand, bears no relationship to the procedure necessary to effectuate the actual foreclosure. This appeal does not question the validity of these proceedings, which, furthermore, differ greatly from those employed in North Carolina.



Although this Court has overturned some state statutory schemes in which defenses to possessory actions were limited, this appeal does not challenge such a scheme. The proceedings below bear no resemblance to either the summary garnishment proceedings invalidated in *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), or the summary seizure of goods similarly condemned in *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). Unlike those cases, Massachusetts proceedings pursuant to the Relief Act, even when the foreclosing mortgagee's petition is allowed, do not result in the deprivation of property. Indeed the only effect of the allowance of the mortgagee's petition is the prevention of a potential future cloud on the mortgagee's title. In order to foreclose, the mortgagee still must comply with all the relevant provisions of Massachusetts law which allow sufficient time for actions by the mortgagor to prevent foreclosure.

Furthermore, this Court has consistently permitted states to require certain defenses to actions for possession of real estate to be litigated separately. *Lindsey* v. *Normet,* 405 U.S. 56 (1972); *Bianchi* v. *Morales,* 262 U.S. 170 (1923); *Grant Timber Co.* v. *Gray,* 236 U.S. 133 (1915). In *Grant Timber,* the Court upheld a Louisiana statute which barred defendants in any possessory action from bringing suit to establish title until after judgment had been rendered in the possessory suit. Eight years later, in *Bianchi,* this Court similarly upheld the validity of a Puerto Rico statute which limited the defenses available to foreclosure itself to the defense of payment. Just three years ago, in *Lindsey,* this Court, in upholding an Oregon statute effectively limiting defenses to Forcible Entry and Wrongful Detainer suits to payment of rent, relied upon *Grant Timber* and *Bianchi* as precedent for its decision. These cases all stand for the proposition that states "may exclude all claims of ultimate right from possessory actions, consis-

tently with due process of law." *Bianchi* v. *Morales, supra* at 171.

Massachusetts has limited the issues which can be raised in a hearing to determine the existence of certain persons to the existence or non-existence of such persons. If a state can constitutionally limit defenses to a foreclosure action itself, it can certainly limit issues which can be raised in an action which is at most a prelude to foreclosure. *See Bianchi* v. *Morales, supra.* Indeed, an action pursuant to the Relief Act is not even necessary in order to foreclose. *Beaton* v. *Land Court, supra* at 1012-13, 326 N.E. 2d. at 305-306. Accordingly, the decisions of this Court on this issue conclusively support the holding of the Supreme Judicial Court of Massachusetts and make it evident that the Beatons' Jurisdictional Statement does not raise a substantial federal question.

## Conclusion

For the reasons stated above, the Appellees, Judges of the Land Court, respectfully urge that the Court dismiss this appeal for want of a substantial federal question, or in the alternative, that it affirm the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.*

Respectfully submitted,

FRANCIS X. BELLOTTI
*Attorney General*
S. STEPHEN ROSENFELD
*Assistant Attorney General*
JAMES R. ADAMS
*Assistant Attorney General*
JOHN F. HURLEY
*Assistant Attorney General*
Room 373, State House
Boston, Massachusetts 02133
(617) 727-2260

August 4, 1975

* The assistance of Neil B. Cohen of New York University School of Law is gratefully acknowledged.

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-34

COLIN F. BEATON AND ELEANOR M. BEATON,
APPELLANTS,

*v.*

JUDGES OF THE LAND COURT, ET AL.,
APPELLEES.

## ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

## MOTION TO DISMISS OR AFFIRM

BLAIR L. PERRY
DAVID S. MORTENSEN
HALE AND DORR
28 State Street
Boston, Massachusetts 02109
*Counsel for Appellee*
*Quinoil Industries, Inc.*

Blanchard Press, Inc., Boston, Mass. — Law Printers

## TABLE OF CONTENTS


| | Page |
|---|---|
| The State Statute Involved and The Nature of the Case | 2 |
| The Statute | 2 |
| The Proceedings Below | 2 |
| The Case Presents No Substantial Question Not Previously Decided by This Court | 4 |
| Conclusion | 10 |


### Table of Citations

#### *Cases*


| | |
|---|---|
| *Beaton et al.* v. *Judges of the Land Court, et al.*, 1975 Mass. Adv. Sh. 1005 | 4, 6, 8, 9 |
| *Bianchi* v. *Morales*, 262 U.S. 170 (1923) | 7 |
| *Boyajian* v. *Hart*, 284 Mass. 557 (1933) | 8 |
| *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) | 8 |
| *Grant Timber & Mfg. Co.* v. *Gray*, 236 U.S. 133 (1915) | 7 |
| *Guleserian* v. *Pilgrim Trust Co.*, 331 Mass. 431 (1954) | 5 |
| *Lindsey* v. *Normet*, 405 U.S. 56 (1972) | 7, 8, 9 |
| *Lynn Institution for Savings* v. *Taff*, 314 Mass. 380 (1943) | 5 |
| *McCombs* v. *Elmes*, 197 Mass. 19 (1907) | 8 |
| *Newman* v. *Greenberg*, 1972 Mass. Adv. Sh. 771 | 8 |
| *Perry* v. *Sindermann*, 408 U.S. 593 (1972) | 7 |
| *Yakus* v. *United States*, 321 U.S. 414 (1944) | 9 |


#### *Statutes*


| | |
|---|---|
| 50 U.S.C. App. §532 | 2, 3, 5, 6 |
| Mass. G.L. ch. 244 | 4, 5, 8 |
| Acts 1943, Section 57 | 2, 3, 5 |
| Acts 1959, C. 105 | 2, 3, 6 |
| Mass. R. Civ. P. 65 | 9 |

# In the
# Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-34

---

COLIN F. BEATON AND ELEANOR M. BEATON,
APPELLANTS,

*v.*

JUDGES OF THE LAND COURT, ET AL.,
APPELLEES.

---

**ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS**

---

**MOTION TO DISMISS OR AFFIRM**

---

The Appellee Quinoil Industries, Inc. moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Judicial Court of Massachusetts on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## I.

## The State Statute Involved and the Nature of the Case

### A. The Statute

This appeal raises the question of the validity of St. 1943 Section 57 of the Laws of the Commonwealth of Massachusetts as amended by St. 1959 c. 105. This statute, as amended, establishes a proceeding by which a foreclosing mortgagee may meet the requirements of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 532 (1970) (hereinafter "1940 Relief Act"). The statute permits a mortgagee who is seeking to foreclose a mortgage to file a bill to foreclose in the Land Court. The statute provides for notice under the 1940 Relief Act to be given specifically to the mortgagor, as well as general notice by publication. An amendment to this statute, St. 1959 c. 105, limits the proceeding in the Land Court under such a bill to foreclose solely to a consideration of the issues of the existence of persons entitled to the benefit of the 1940 Relief Act and their rights, if any. The amendment also provides that persons who are not entitled to the benefits of the 1940 Relief Act, or appearing on behalf of such persons, are not permitted to appear or be heard in such a proceeding.

### B. The Proceedings Below

The Appellants (hereinafter "the Beatons"), husband and wife, own in fee as tenants by the entirety certain real estate in Bridgewater, Massachusetts. On October 10, 1966, the Beatons mortgaged the land to the appellee Quinoil Industries, Inc., then named Quincy Oil Co. (hereinafter "Quinoil"). The mortgage provided: "This mortgage is



upon the statutory condition . . . for any breach of which the mortgagee shall have the statutory power of sale."

On February 20, 1974, Quinoil filed a "Bill to Foreclose Mortgage" in the Land Court, under the procedure established by St. 1943, c. 57, as amended by St. 1959, c. 105. The Land Court then issued an order of notice which advised:

> "If you are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended and you object to such foreclosure you or your attorney should file a written appearance and answer in said court . . . or you may be forever barred from claiming that foreclosure is invalid under said act."

The Beatons were duly served with this notice. It is undisputed that the Beatons do *not* claim to be persons entitled to the protection of the 1940 Relief Act.

Nevertheless, the Beatons attempted to file their appearance and a purported answer with the Clerk of the Land Court. This answer did not raise any claim or issue under the 1940 Relief Act. It was not accepted for filing but was referred to the Judges of the Land Court, Appellees Randall and Sullivan (hereinafter "the Land Court Judges"). The Beatons also filed a motion that their purported answer be accepted for filing, which the Land Court Judges denied, relying on St. 1959, c. 105 which precluded the Beatons from appearing and filing the answer in the proceeding since their claims were unrelated to the 1940 Relief Act.

The Beatons then filed a Writ of Mandamus before a single Justice of the Supreme Judicial Court of Massachusetts seeking to compel the Land Court Judges to cause the purported answer to be accepted for filing and to adjudicate the issues raised in it. The Single Justice sustained demurrers to the petition for Writ of Mandamus,

and the Beatons appealed this decision to the Supreme Judicial Court. In an opinion entered April 10, 1975, the Supreme Judicial Court affirmed, stating that "[t]he appeal is utterly without merit." 1975 Mass. Adv. Sh. 1005, 326 N.E.2d 302. Moreover, finding the appeal "without merit and having accomplished no purpose except delay" it awarded appellees double costs of that appeal. *Id.* at 1019. The Beatons have appealed to this Court from that judgment.

A collateral case involving the Beatons and Quinoil is not directly before this Court for review but it is relevant. On September 12, 1973, the Beatons had filed in the Superior Court for Plymouth County, Massachusetts a Bill in Equity to redeem and discharge the mortgage in question. This action is still being prosecuted in the Plymouth Superior Court.

## II.

## Argument

### The Case Presents No Substantial Question Not Previously Decided By This Court

Under the General Laws of the Commonwealth of Massachusetts, Mass. G.L. ch. 244, there are two methods for the foreclosure of mortgages after a breach of condition: by entry or action, Mass. G.L. ch. 244, §§ 1-10, and by sale under a power of sale, Mass. G.L. ch. 244, §§ 11-15. With respect to the Beatons' mortgage Quinoil was following procedures for foreclosure under the statutory power of sale. A brief summary of this procedure will help to clarify the nature of the Land Court proceedings in which the Beatons contend they were unconstitutionally prevented from appearing and answering.



Foreclosure under a power of sale is a nonjudicial procedure in that it can be accomplished without bringing an action in any court. Mass. G.L. ch. 244, §§ 11-15. To foreclose, a mortgagee must, *inter alia*, publish notice of the forthcoming foreclosure sale once a week for three successive weeks in a newspaper in the town in which the land lies. Mass. G.L. ch. 244, § 14. The sale may then take place, and if otherwise properly conducted, the sale effectively forecloses the mortgage. Mass. G.L. ch. 244, § 14.

Statute 1943, c. 57, as amended, gives a mortgagee a procedure, in addition to those nonjudicial procedures necessary for a valid foreclosure, by which the mortgagee can avoid any cloud on the title which might result from an interested party having been in, or just released from, military service and thus within the aegis of the 1940 Relief Act. *See Lynn Institution for Savings* v. *Taff*, 314 Mass. 380, 386, 50 N.E.2d 203 (1943). Failure to comply with the 1940 Relief Act does not invalidate the foreclosure sale as to anyone not entitled to the benefits of that Act. *Guleserian* v. *Pilgrim Trust Co.*, 331 Mass. 431, 433-34, 120 N.E.2d 193 (1954).

The Beatons contend that not allowing them to answer in the Land Court proceeding deprived them of substantial property rights without due process of law (Jurisdictional Statement at 10). This claim, it appears, rests on two arguments: the Beatons contend that the Land Court in the proceeding under Stat. 1943, section 57, as amended, adjudicates the question whether there has in fact been a default of the mortgage (Jurisdictional Statement at 13), and in addition they may be contending that if they are not allowed to answer in the Land Court proceeding the mortgage may be foreclosed without any prior judicial hearing in which they may contest the alleged breach of condition (*Id.* at 15). Neither argument is substantial.

Both the amendment to the Statute, Stat. 1959, c. 105 and the opinion of the Supreme Judicial Court, 1975 Mass. Adv. Sh. at 1011-13; 326 N.E. 2d at 305-306, make it clear that the only issues to be raised in the Land Court proceeding are those related to the 1940 Relief Act.

The Land Court proceeding, to be sure, was initiated by a "Bill to Foreclose," which has language, *inter alia,* to the effect that a breach of condition of the mortgage exists, and the decrees issued in such a proceeding generally would speak in terms of "authorizing" and "approving" the foreclosure sale. The use of this language, however, does not mean that as a substantive matter the Land Court proceeding involves, or is capable of involving, any substantial property interest of the Beatons. Because of the statutory limitation on the Land Court's power in such a proceeding, it is clear that despite the Beatons' contentions to the contrary (Jurisdictional Statement at 13) and regardless of the particular language used in the formal documents involved in the proceeding, there can be no adjudication by the Land Court in such a proceeding as to whether there has been a breach of condition of the mortgage, or indeed as to any factual or legal issue not related to the 1940 Relief Act. Moreover, since persons asserting no claim under the 1940 Relief Act are precluded from appearing in such proceedings, there is no collateral estoppel or res judicata effect as to any factual determination made in such proceedings except those determinations, if any, related to the 1940 Relief Act (which the Beatons have not contested).

After the Land Court proceeding, therefore, there is no right or claim which the Beatons might have asserted before the proceeding which they are foreclosed from exercising or asserting afterwards except their rights, either nonexistent or knowingly waived, under the 1940 Relief Act. The Land Court proceeding thus leaves the



Beatons in exactly the same condition vis-a-vis their property as they were in before the proceeding. It in no way deprives the Beatons of any substantial interest in their property, and refusing to allow them to appear in the proceeding thus cannot constitute a deprivation of property without due process of law, *Perry* v. *Sinderman,* 408 U.S. 593 (1972).

A somewhat more general, although equally unsupportable, argument appears to underlie the Beatons' claim. This appears to be that somehow the Beatons must be allowed to appear in the Land Court proceeding in order to assure that they have an opportunity for a judicial hearing, prior to the sale, on the contentions on which they wish to contest the foreclosure. As an initial matter, even assuming that they have a right to such a prior hearing, there is no reason why it should be compelled as a part of the Land Court proceeding. The jurisdiction of the Land Court in such a proceeding has been clearly circumscribed by statute, and even if there were a constitutional requirement that the Beatons be afforded a prior hearing, such a requirement could be met by a hearing in any other legitimate forum. *Lindsey* v. *Normet,* 405 U.S. 56 (1972); *Bianchi* v. *Morales,* 262 U.S. 170 (1923) (Holmes, J.); *Grant Timber & Mfg. Co.* v. *Gray,* 236 U.S. 133 (1915) (Holmes, J.). The Beatons err in suggesting that because the Land Court is empowered to adjudicate certain extremely limited issues as to mortgage foreclosure it must as a constitutional matter be empowered to adjudicate every issue which the Beatons seek to raise.

In fact the Beatons *are* accorded an opportunity to raise those issues which they seek to raise and they are accorded such an opportunity in a forum and pursuant to a procedure which clearly meets all the requirements of due process of law. There can be no possibility of constitutional infirmity in denying the Beatons an opportunity

to contest an issue in one forum if they are clearly given the opportunity to raise and contest the issue in another forum. *Lindsey* v. *Normet, supra.*

The due process clause requires, with respect to state action amounting to a deprivation of any substantial interest in property, that the person whose interest is affected be accorded an opportunity for a hearing, after due notice, at some time prior to the deprivation. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). The foreclosure by sale does not appear to involve significant state action, but in any case the Beatons obviously had prior notice of the prospective foreclosure. Indeed, the opinion of the Supreme Judicial Court makes it clear that it would be extremely unlikely that any mortgagor would not receive adequate notice of a mortgage foreclosure, 1975 Mass. Adv. Sh. at 1017-18; 326 N.E. 2d at 307. The particular statute attacked here, moreover, provides for specific notice of the prospective foreclosure to the mortgagor, as well as notice by publication. Thus, the Beatons received, and were virtually assured of, prior notice of the foreclosure by sale.

Even though the foreclosure was a nonjudicial one, and thus cannot be considered state action, the Beatons then had an opportunity for a judicial hearing of their claim prior to the foreclosure. A mortgagor who wishes to oppose foreclosure by sale may initiate a civil action to enjoin the foreclosure and to obtain an accounting. *Newman* v. *Greenberg,* 1972 Mass. Adv. Sh. 771, 281 N.E. 2d 590; see Mass. G.L. ch. 244, § 22. Claims that a breach of condition has not occurred may be raised and adjudicated in such an action brought to restrain the foreclosure. *Boyajian* v. *Hart,* 284 Mass. 557 (1933); *McCombs* v. *Elmes,* 197 Mass. 19 (1907). In fact, the opinion of the Supreme Judicial Court in this case stated unequivocally that there would be no obstacle to the Beatons seeking an injunction against the foreclosure sale as a part of their ongoing related



action against Quinoil in the Plymouth Superior Court. 1795 Mass. Adv. Sh. at 1019; 326 N.E. 2d at 306-307. There is no constitutional infirmity in requiring a party to initiate an action to assert its claims against a potential deprivation of property. *Lindsey* v. *Normet, supra.*

Thus, the Beatons' only complaint must be that the type of hearing available to them if they chose to contest the foreclosure in the Superior Court would be inadequate to protect their rights. The Plymouth Superior Court has jurisdiction to issue a temporary restraining order and preliminary injunction, Mass. R. Civ. P. 65, and there is no reason why the Beatons could not have had a judicial hearing on a motion for a preliminary injunction prior to the foreclosure if they had only applied for one. To be sure, if after this hearing a preliminary injunction were denied, the trial of the Beatons' claims might not take place until after the foreclosure sale, but such delay would only occur if the court determined that the Beatons' claims did not warrant interlocutory relief.

The Beatons contend that such an opportunity for a prior hearing is constitutionally inadequate because the Superior Court would have discretion not to enjoin the foreclosure sale (Jurisdictional Statement at 15). It is illogical to equate, as the Beatons do, an absolute denial of a hearing with discretion not to accord the relief sought. Moreover, this Court has made it clear in *Yakus* v. *United States,* 321 U.S. 414 (1944), upon which the Beatons rely (*Id.* at 15), that even where there is no opportunity for interlocutory judicial intervention and where the only forum in which relief from a governmental order affecting substantial property interests is an administrative agency with "wide scope for the exercise of . . . discretionary power" there is no denial of due process. *Id.* at 439.

Even more critically, the Beatons made no attempt prior to the decision here appealed from to apply to the Plymouth

Superior Court for interlocutory relief from the proposed foreclosure sale. They therefore have no standing to assert in this proceeding that such an attempt would have been futile, and their assertion that any hearing on such application would be constitutionally infirm is premature, unsupportable and not properly before the Court in this proceeding.

The Beatons were therefore not deprived of any substantial interest in property by the Land Court proceedings, and their assertions that they have been denied due process by being excluded from such proceedings are completely without merit.

## III.

## Conclusion

Wherefore, Appellee Quinoil Industries, Inc., respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

BLAIR L. PERRY
DAVID S. MORTENSEN
HALE AND DORR
28 State Street
Boston, Massachusetts 02109
*Counsel for Appellee*
*Quinoil Industries, Inc.*